Office - Supreme Court, U. S.
FILED
JUL 2 1949
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1949

No. 158

STATE AIRLINES, INC.,
Cross-Petitioner,

against

CIVIL AERONAUTICS BOARD and
PIEDMONT AVIATION, INC.,
Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI

State Airlines, Inc.,
Cross-Petitioner,
By Frederick W. P. Lowenstein,
Counsel for Cross-Petitioner.

Philip Sorlett,
Of Counsel.

Dated: July 5, 1949.

TABLE OF CONTENTS

	PAGE
Basis for Jurisdiction	2
Summary and Short Statement of Matter Involved	3
Questions Presented	13
Reasons Relied On for the Allowance of These Writs	15
Conclusion	19

TABLE OF CASES

All American Aviation, Combination Service, 8 C. A. B. 241 [Adv. Sheet] 4

All American Aviation, Pick-up, Delivery Service, 2 C. A. B. 133 4

Ashbacker Radio Corp. v. *F. C. C.*, 326 U. S. 327 ..... 13, 19

Colonial Air. et al., Atlantic Seaboard Op., 4 C. A. B. 392 3

Docket No. 1973, et al., Fairbanks-Nome Intermediate Points Case, decided March 31, 1949 [Adv. Sheet] 17

Eastern A. L. et al., Great Lakes-Florida, 6 C. A. B. 429 .. 3

Federal Comm'n v. *Broadcasting Co.*, 309 U. S. 134, 12, 13, 14, 16

George Allison & Co. v. *Interstate Commerce Com'n*, 70 App. D. C. 375, 107 F. 2d 180 15

Public Service Com. v. *State, ex rel.*, 184 Ind. 273 16

Securities Comm'n v. *Chenery Corp.*, 332 U. S. 194 18

Transcontinental & Western Air, Inc., Petitioner v. *Civil Aeronautics Board*, 335 U. S. 884 [Adv. Sheet] 3

United States v. *Hines*, 70 App. D. C. 36, 103 F. 2d 737. 16

STATUTES AND REGULATIONS

	PAGE
Administrative Procedure Act of 1946 § 5(a)	9
Administrative Procedure Act of 1946 § 10(e)	1, 10, 14, 15, 19
Civil Aeronautics Act § 401 (d)	12
Civil Aeronautics Act § 401 (d) (1)	11, 16, 17
Civil Aeronautics Act § 401 (d) (2)	11, 17
Economic Regulations (Civil Aeronautics Board) Amendment No. 3 of § 238.1	9
Regulation (Civil Aeronautics Board), Serial # 284	9
Regulation (Civil Aeronautics Board), Serial # 285	9
52 Stat. 987	9, 11
60 Stat. 237	10
60 Stat. 239	9
60 Stat. 243	1, 14, 15
Supreme Court Rules, Rule 38, subd. 5(c)	15, 16
5 U. S. C. § 1004(a)	9
5 U. S. C. § 1009(e)	1, 10, 12, 14, 15
49 U. S. C. § 481(b)	9
49 U. S. C. § 481(c)	9
49 U. S. C. § 481(d)(1)	9, 11
49 U. S. C. § 481(d)(2)	9
United States Code, Title 28 § 1254 (1)	2, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

STATE AIRLINES, INC.,
Cross-Petitioner,

against

CIVIL AERONAUTICS BOARD and
PIEDMONT AVIATION, INC.,
Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, STATE AIRLINES, INC. (hereinafter referred to as "State"), prays that a writ of *certiorari* issue to the United States Court of Appeals for the District of Columbia Circuit to review that portion of its decision and judgment, entered April 6, 1949, in which that court declined to make an order requiring the Civil Aeronautics Board to issue a certificate of public convenience and necessity to State—a decision predicated upon the holding that the court lacked power, in spite of the provisions of Section 10 (e) of the Administrative Procedure Act of 1946,[1] to make such an order.[2]

[1] 60 Stat. 243 (1946); 5 U. S. C. § 1009(e).

[2] On this score, the court concluded on the last page of its opinion:

"Whether or not it is so that the Board has already made the requisite findings which would entitle State to a certificate, we

The refusal by the Court of Appeals to issue the order in question is embodied in a decision otherwise in favor of State. The Civil Aeronautics Board (hereinafter referred to as the "Board") and the intervenor below, respondent Piedmont Aviation, Inc. (hereinafter referred to as "Piedmont"), have filed petitions for writs of *certiorari* to review the decision and judgment of the Court of Appeals reversing, on State's appeal, the determination of the Board which had awarded a certificate of public convenience and necessity to Piedmont and had denied State's application therefor.

A certified transcript of the record in this case, including the proceedings in the court below as to which the writ is sought, has been filed in this Court by the Civil Aeronautics Board in connection with its petition for writ of *certiorari*. This cross-petition is made on the same record. The printed record filed with the original petition is also utilized on this cross-petition.

Basis for Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1). The decision and judgment, to a portion of which the writ here sought is to be directed, were entered on April 6, 1949.[1] This Court has recently, in

---

agree with respondent that this court lacks the power to order the issuance of a certificate which the Board has declined to issue. We do not read the allegedly pertinent section of the Administrative Procedure Act with its mandate that this court shall 'compel agency action unlawfully withheld,' as requiring that result. On the contrary we regard ourselves bound in this respect by the decision of the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.* [309 U. S. 134]."

---

[1]The opinion of United States Court of Appeals for the District of Columbia Circuit has not yet been reported; it is also dated April 6, 1949.

Transcontinental & Western Air, Inc., Petitioner v. *Civil Aeronautics Board*, 335 U. S. 884 (Adv. Sheet),[1] issued a writ of *certiorari* to review a judgment, construing a section of the Civil Aeronautics Act, made by the United States Court of Appeals for the District of Columbia Circuit, in an action such as the present one involving an order of the Civil Aeronautics Board. While here the statute to be construed is the Administrative Procedure Act, the type of problem presented (*i.e.*, construction of a previously unconstrued section of a federal statute) appears to be undistinguishable from the one which was reviewed in the *Transcontinental & Western* case, *supra*.

Summary and Short Statement of Matter Involved

On October 21, 1941, State filed with the Civil Aeronautics Board its original application for a certificate of public convenience and necessity authorizing local mail, passenger and property transportation connecting points in the southeastern United States with points across the Appalachian Mountains in the Ohio River Valley and the Great Lakes basin (R. 16740).[2] The Board, for one reason or another, postponed consideration of State's original application for some years.[3] As a result of Board action, State filed various other applications all of which, however, retained the basic east-west route system connecting southeastern points with the Ohio Valley cities across the Appalachian Mountains (App. 1-26).[4] The applications became

---

[1]Decided on the merits April 18, 1949.

[2]This type of citation is to the unprinted certified transcript of record to which the parties, pursuant to stipulation, may make reference.

[3]See *Colonial Air. et al., Atlantic Seaboard Op.*, 4 C. A. B. 392, 399-400, and *Eastern A. L. et al., Great Lakes-Florida*, 6 C. A. B. 429, 452-4.

[4]This type of citation is to the printed Joint Appendix to the briefs of the parties in the court below. This Appendix has been stipulated by all parties to be a part of the printed record here.

progressively more local and restricted as the Board awarded the routes which had been applied for by State to others. State finally went to the hearings here involved before the Board's trial examiners on the basis of a route system connecting the coastal and Piedmont regions of the Carolinas and Virginia with terminal points of Cincinnati and Louisville on the western side of the Appalachian range (App. 508-9; see map which is a part of the opinion below).

In the meanwhile, on June 2, 1944 (App. 31-41), Piedmont filed its application covering mail, passenger and property transportation combined with pick-up[1] service over routes constituting a network covering nearly all towns in North Carolina and a substantial number of towns in South Carolina and Virginia. Piedmont's proposed routes extended slightly into Georgia, Maryland, Pennsylvania and Virginia. One route extended through West Virginia, along the Ohio River Valley to Cincinnati.

Before any hearings were held on Piedmont's application, Piedmont, on March 8, 1945, amended it (App. 62-70). By this amendment, Piedmont separated its application into two parts seeking separately authority to transport mail, passengers and property in the conventional manner on certain proposed routes, and mail, express and property using the pick-up method on other proposed routes (App. 64-70).

---

[1]"Pick-up Service" is service of points without stops whereby mail is picked up from a ground installation by a device on the plane, while in flight (*All American Aviation, Pick-up, Delivery Service*, 2 C. A. B. 133, 137, f.n. 3). This service needs no airports except the termini and is obviously unsuited for passengers and conventional transportation of property. The Civil Aeronautics Board has held that the combination of pick-up and passenger service is unsafe and will not be authorized (*All American Aviation, Combination Service*, 8 C. A. B. 241, 242, Adv. Sheet).

In this amendment, Piedmont expressly abandoned its application to carry passengers, mail and property in the conventional manner except with respect to the very limited routes predominantly in a northerly and southerly direction (all east of the Appalachians) running (1) from Washington, D. C., to Hagerstown, Maryland, then through the Shenandoah Valley to Roanoke, Virginia, and ultimately to Columbia, South Carolina; (2) from Norfolk, Virginia, to Roanoke, Virginia, and (3) from Wilmington, North Carolina, to Knoxville, Tennessee (App. 69-70; see map which is part of opinion below).

The passenger, mail and property routes applied for thus specifically stopped short of crossing the Appalachians into the Ohio Valley and indeed entered those mountains at only one or two points. Even the application for pick-up service which would appear to have no relevancy in this controversy relating to passenger, mail and property certification abandoned any pretense of connecting southeastern points with the Ohio Valley cities across the Appalachian Mountains, although one insignificant segment of the proposed pick-up routes did reach Charleston, West Virginia.

The applications of State, Piedmont and a number of other applicants were ultimately consolidated for hearing before the Board's examiners (App. 27).

At such hearings, State introduced substantial evidence establishing that public convenience and necessity required the certification of its proposed routes joining the Carolinas and Virginia with the Ohio Valley cities to the west of the Appalachian Mountains (App. 213-9, 245; 234; State's Exhs. G, 2-30, App. 79-104, 111-40). State likewise produced voluminous evidence relating to proposed schedules, revenue estimates, cost estimates based upon approved multi-motored aircraft, air-

mail estimates, weather data, etc. relating to its proposed routes (State's Exhs. 31-82; App. 140-220). All of State's evidence emphasized and amplified State's application for routes from Virginia and the Carolinas west to the Ohio River Valley cities on the other side of the Appalachian range.

Piedmont, on the other hand, introduced evidence relating solely to its application covering principally north-south routes east of the Appalachian Mountains (App. 283-474). Piedmont introduced no evidence as to public convenience and necessity for transportation between the Carolinas and Virginia and Ohio River Valley points. It introduced no evidence as to its fitness or ability to operate such transportation. It offered no plan for such operation. It introduced no schedules and no evidence of financial ability to operate such routes. It made no cost estimates based upon the operation of multi-motored aircraft which would be required over the mountainous terrain in question but limited its evidence[1] to a proposed single-engined aircraft (App. 368) to be operated on its north and south routes which, as its counsel emphasized, avoided the mountains "crossing the Blue Ridge Mountains at only one point, the southern-most end of those mountains where they are very low"[2] (App. 553).

The other applicants also introduced evidence as to their proposals which are, however, not now relevant.

---

[1]As the court below concluded (Opinion, p. 8):

> "In the instant case, we have presented the still stronger situation wherein, even at the time of the Board's finding that Piedmont was fit, willing, and able, there was *no* evidence of Piedmont's appropriate qualification for the awarded routes."

[2]But, as the court below pointed out, the certificate issued to Piedmont authorized transportation over the highest mountains east of the Mississippi (Opinion, p. 9, f.n. 18).

The examiners found public convenience and necessity for the transportation proposed by State, found State fit, willing and able to render such transportation and recommended State for a portion of the trans-Appalachian routes for which it had applied (App. 508-11, 513-6, 521-2).

The examiners also recommended for Piedmont a portion of its predominantly north-south route, east of the Appalachian Mountains, from Winston-Salem, North Carolina, to Washington, D. C., and the branch from Roanoke, Virginia, to Norfolk, Virginia (App. 518-9, 520).

State, Piedmont and Public Counsel (as well as some of the other participants in the hearings) filed exceptions to the examiners' report. State excepted generally to the failure of the examiners to recommend its entire integrated system of east-west routes and excepted specifically to the failure to recommend for State the route from Cincinnati to Norfolk, Louisville to Norfolk and Charlotte, North Carolina, to Chattanooga, Tennessee (App. 528-31). Public Counsel sided substantially with State in connection with these exceptions (App. 535-7, 549, 550).

Piedmont's exceptions dealt only with the failure to extend its north-south route southerly from Winston-Salem to Chester and Camden and to the failure to recommend its route from Wilmington, North Carolina, to Asheville and Knoxville, Tennessee (App. 533-4).[1]

Upon argument before the Board no one took the position that Piedmont should be awarded the certificate for the transportation for which State had applied.

---

[1]Piedmont's exception (App. 534) to the failure to recommend it for a "pick-up" service certificate is not here material.

The Board in its original decision (7 C. A. B. 863; App. 565 [863]),[1] concluded that public convenience and necessity required only transportation for which Piedmont had *not* applied (*id.* [p. 888]). The Board, almost in the language of State's evidence, concluded that the transportation over the Appalachian range applied for by State was required by public convenience and necessity (App. 565 [892-5] and *cf.* App. 115, 120, 217, 219, 234, 245).

Having thus found, pursuant to the statutory requirement, that public convenience and necessity required the east-west transportation for which State had applied, the Board turned to the selection of the carrier to be certificated. The Board rejected summarily the applications of six companies seeking certificates for local service (App. 565 [898-90]). It then concluded (App. 565 [901]):

> "The choice has thus narrowed down to State Airlines and Piedmont Aviation, and which of these two companies should be selected to conduct the proposed service presents a close and difficult question. Both have engaged in various phases of aeronautics for a period of years.
>
> * * * *
>
> "Each applicant has shown an adequate financing program, and each has demonstrated an energetic interest in the conduct of the operations."

The Board selected Piedmont principally because it had conducted certain pilot training programs and had engaged in other fixed base activities, whereas State had concentrated on charter operations and thus did not have as large a staff. The Board added, however, that there was no doubt that State

---

[1]This decision has been bound into the printed Appendix here at page 565; the page citations following in brackets are also the page citations to Volume 7 of the Civil Aeronautics Board Reports in which the decision is reported.

could obtain the requisite personnel but the Board was of the opinion that inauguration of service might take State somewhat longer.[1] (App. 565 [902]).

State filed its petition for rehearing (App. 566) specifically contending that the Civil Aeronautics Board could not legally certify Piedmont because it did not meet the requirements of the Civil Aeronautics Act in that (a) Piedmont had not applied for the routes awarded to it;[2] (b) it had not furnished any evidence or plan for such transportation and had failed to demonstrate its fitness as a scheduled carrier in many other basic respects, and (c) the certification of Piedmont violated due process of law for it had not been considered by anyone as an applicant for the trans-Appalachian routes awarded to it.[3]

The Civil Aeronautics Board, however, adhered to its original decision (App. 610), but in so doing emphasized that

[1]The Board's decision was made on April 4, 1947, six years after State's original application for the routes in question. The sudden emphasis upon speed in commencing operation is hard to understand even if the Board's conclusion in this respect had been correct (a conclusion which State contends was baseless).

[2]The statute under which the Board purported to act limits the Board's power to the issuance of a certificate "authorizing the whole or any part of the transportation *covered by the application* * * *" [49 U. S. C. § 481 (d) (1), (2); 52 Stat. 987 (emphasis supplied)].

[3]Such certification, without notice to State, Public Counsel or anyone else, was not only a violation of general concepts of due process of law, but a violation of specific provisions of the Civil Aeronautics Act which require an application to be in writing specifying information required by the Board and require service either of the application or due notice thereof upon all interested persons and the public [49 U. S. C. § 481 (b), (c); 52 Stat. 987]; it was further a violation of the regulations of the Civil Aeronautics Board which, pursuant to the statute, require complete disclosure of the routes applied for specifying points to be served and require notice with respect to such information to be given to all interested persons (Regulation of the Civil Aeronautics Board, Serial Nos. 284 and 285; Amendment No. 3 of Section 238.1 of the Economic Regulations); it was also a violation of Section 5(a) of the Administrative Procedure Act [5 U. S. C. § 1004(a); 60 Stat. 239] requiring all interested persons to be "timely informed of * * * the matters of fact and law asserted".

it had found State fit, willing and able to conduct the transportation in question. Thus, the Board said (App. 612):

> "States ability to build up a qualified organization is not questioned. That it could do so was implicit in the finding that the carrier was fit, willing, and able."

Upon appeal by State to the United States Court of Appeals for the District of Columbia Circuit, the Board's determination was reversed (Judge Edgerton dissenting without opinion). The court held that Piedmont was not entitled to the certificate in question because it had not applied for the transportation certificated and because there was no evidence to show that it was fit, willing and able to conduct the transportation in question. The action of the Board in certifying Piedmont was held to have been (a) without sanction of the Civil Aeronautics Act and (b) "arbitrary and capricious".

The court remanded the case to the Board for proceedings not inconsistent with the court's opinion.

The court below, however, denied State's request made pursuant to Section 10(e) of the Administrative Procedure Act of 1946[1] for an order compelling the Civil Aeronautics Board to issue a certificate of public convenience and necessity, either temporary or permanent, to State (see footnote 2 p. 1, *supra*).

State's request for such an order was based on the theory that the Board had made all determinations of fact which Congress had entrusted to it under the Civil Aeronautics Act,

---

[1]60 Stat. 237, 243; 5 U. S. C. § 1009 (e). This section provides that a court having jurisdiction to review the action of an administrative agency "shall (A) compel agency action unlawfully withheld or unreasonably delayed" as well as "(B) hold unlawful and set aside agency action, findings, and conclusions found to be" arbitrary, capricious, contrary to law, including constitutional provisions, lacking in proper procedure required by law, unsupported by substantial evidence or unwarranted by the facts.

Sections 401(d) (1) and (2). After the elimination of Piedmont, as a matter of law, there remained only the ministerial act of issuing the certificate to State. This appears from the following undisputed facts:

(1) The Board specifically found public convenience and necessity for the transportation applied for by State (App. 565 [892-6]).

(2) The Board found State fit, willing and able to conduct the transportation in question (App. 612).

(3) Under the statute [Civil Aeronautics Act, Section 401(d)(1)][1] the Board "shall" thereupon issue to applicant a permanent certificate unless the Board elects to issue a temporary certificate under Section 401(d)(2) of the Act —one or the other the Board must do.

(4) If it be assumed, *arguendo*, that the statute permits the Board, as between competing applicants, all of whom have been found fit, willing and able, to choose the most fit, willing and able, the Board likewise made that choice in State's favor.

(5) The Board, *qua* State, exercised its discretion by eliminating every other *applicant* for these local routes (App. 565 [896-901]).

---

[1]The section in question provides [49 U. S. C. § 481 (d) (1); 52 Stat. 987]:

"(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

(6) Thereupon, the Board stated (App. 565 [901]) "The choice has thus narrowed down to State Airlines and Piedmont Aviation, and which of these two companies should be selected to conduct the proposed service presents a close and difficult question."

(7) Piedmont, not being an applicant within the statute, for the transportation certificated, as the court below found, is eliminated as a matter of law.

(8) The Board, therefore, by its own findings and the exercise of its own discretion, determined that State was the only fit, willing and able *applicant* for the transportation found required by public convenience and necessity. Under the Civil Aeronautics Act, the Board, therefore, has no further discretion to exercise but it "shall" issue a certificate to State [Section 401(d)], either permanent or, if it decides to act under the permissive alternative clause, temporary.

As the Board did not perform this purely ministerial act, the Court of Appeals, upon reversing the Board and holding that Piedmont was not an applicant as a matter of law for the transportation certified to it, had the power and, indeed, the duty under the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed" [5 U. S. C. § 1009(e)]. The court below, however, held that it did not have such power solely by reason of the decision made by this Court in *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134 (see quotation from opinion, p. 1, *supra*, f.n. 2).

This decision by the court below, which State claims disregards the plain language of the Administrative Procedure Act

and misapplies *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, is the subject matter of the present cross-petition for writ of *certiorari*.

Questions Presented

1. To what extent do the decisions in this Court require the federal courts of this country generally to abdicate their powers to grant affirmative relief with respect to actions by administrative agencies (such as the Civil Aeronautics Board) which have wide powers of economic life and death over inhabitants of this country? To state it another way: Is the doctrine of *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, to be extended or delimited? Must the power of the courts to grant effective relief recede further and leave the citizen at the mercy of the administrative agency and, if that be the trend of this Court's decisions,[1] has it been arrested to some extent by the Administrative Procedure Act of 1946? If so, to what extent has that Act achieved its purpose?

2. Did the United States Court of Appeals for the District of Columbia Circuit err in refusing to issue an order compelling the Civil Aeronautics Board to issue to State a certificate of public convenience and necessity, either permanent or temporary, for the transportation found by the Board to be necessary for the public convenience?

3. Did the United States Court of Appeals for the District of Columbia Circuit err in holding and adjudging that it lacked the power to make an order compelling the Civil Aero-

---

[1]But compare *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327.

nautics Board to issue to State a certificate of public convenience and necessity, either permanent or temporary, for the transportation found by the Board to be necessary for the public convenience?

4. Did the United States Court of Appeals for the District of Columbia Circuit err in holding and adjudging that Section 10(e) of the Administrative Procedure Act of 1946 [60 Stat. 243; 5 U. S. C. § 1009(e)] did not empower it to make an order compelling the Civil Aeronautics Board to issue to State a certificate of public convenience and necessity, either permanent or temporary, for the transportation found by the Board to be necessary for the public convenience?

5. Did the United States Court of Appeals for the District of Columbia Circuit err in holding and adjudging that *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, applied to the instant case and was a binding adjudication that the United States Court of Appeals lacked power to make an order compelling the Civil Aeronautics Board to issue to State a certificate of public convenience and necessity, either permanent or temporary, for the transportation found by the Board to be necessary for the public convenience?

6. Where an administrative agency has, as in this case, exercised all discretion entrusted to it by the applicable act of Congress, does the United States Court of Appeals for the District of Columbia Circuit have the power to make an order compelling such administrative agency to issue to the aggrieved party the certification to which it is entitled under the act of Congress?

Reasons Relied On for the Allowance of These Writs

State invokes the exercise of this Court's power under Title 28, United States Code, Section 1254(1), to grant writ of *certiorari* herein prayed for upon the following grounds:

1. The decision below for which review is sought would seem to come precisely within the grounds for review suggested in subdivision 5(c) of Rule 38 of the Rules of this Court. In deciding that it lacked power under Section 10(e) of the Administrative Procedure Act of 1946 [60 Stat. 243; 5 U. S. C. § 1009(e)] to make the order requested by State, the United States Court of Appeals for the District of Columbia Circuit has decided (a) a question of general importance, and (b) a question of substance relating to the construction of a statute of the United States which has not been, but should be, settled by this Court.

It would seem appropriate to have a timely construction by this Court of the scope and meaning of that portion of the Administrative Procedure Act which states the duty of the reviewing court to be that "It shall (A) compel agency action unlawfully withheld or unreasonably delayed". If this language is to have any meaning whatever, it would seem at least to be applicable, as in the present case, where the administrative agency has made all findings of fact in State's favor and has come to an erroneous conclusion as a matter of law. The Administrative Procedure Act would seem to confer upon the courts at least the power heretofore exercised by writ of mandamus to compel ministerial action wrongfully withheld. See *George Allison & Co.* v. *Interstate Commerce Com'n*, 70 App. D. C. 375, 378, 107 F. 2d 180, 183, and

United States v. *Hines*, 70 App. D. C. 36, 44, 103 F. 2d 737, 745; see also *Public Service Com'n* v. *State, ex rel.*, 184 Ind. 273, 278.

2. Review is here also proper under that portion of subdivision 5(c) of Rule 38 of the Rules of this Court for the reason that the court below has not given proper effect to *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134. If that decision had any relevancy here, it cannot detract from the court's duty and power under the Administrative Procedure Act enacted after the date of that decision.

In any event, the court below improperly held that the *Broadcasting Co.* decision was here relevant. This Court decided in the *Broadcasting Co.* case only that the Court of Appeals had no power by mandamus to compel procedure in the Federal Communications Commission contrary to the Commission's own established rules. In the *Broadcasting Co.* case, the Federal Communications Commission had not made findings of fact in favor of the petitioner there and had not therefore exercised its discretion under the Act of Congress in petitioner's favor. The error which the Federal Communications Commission had committed, consisted in an application of an erroneous standard of law in making a finding of fact that petitioner was insolvent. Upon correcting the legal error, the Court of Appeals could do no more than to remand the case for the making of new findings of fact upon the basis of a proper legal theory. This Court held that the Court of Appeals might not thereafter by mandamus decide the procedure to be adopted by the Federal Communications Commission in hearing pertinent evidence and making new findings.

In the present case, however, as above indicated in the statement, the Civil Aeronautics Board under Sections 401(d)(1)

and (2) has made, *qua* State, all of the discretionary findings of fact which Congress has entrusted to it. It found that a part of the transportation covered by State's application in the language of the statute was "required by public convenience and necessity" (App. 565 [892-6]); it also found as a fact, as required by the statute, that State was "fit, willing, and able" (App. 612). Upon these findings of fact, it erred in not awarding the certificate of public convenience and necessity to State by reason of a misapplication of the law and awarded the certificate instead to Piedmont which was not, as the statute requires, an applicant for the transportation in question. When the court below corrected this legal error, ordered the certificate to Piedmont vacated on the ground that it was not authorized to receive such a certificate, the Board, on the basis of the findings with respect to State, had no choice under the Civil Aeronautics Act for that act states that the Board, upon making the findings of fact here made, "shall issue a certificate authorizing the whole or any part of the transportation covered by the application" [Civil Aeronautics Act, § 401(d)(1)].[1] The only alternative given to the Board under the next subsection is to issue, instead of the permanent certificate required by Section 401(d)(1), a temporary certificate. Plainly, on the findings of fact made by the Board, State is entitled to one or the

---

[1]The language of the statute seems unambiguous and the Board itself has recognized its mandatory character recently in Docket No. 1973, *et al., Fairbanks-Nome Intermediate Points Case*, decided March 31, 1949. The Board said (p. 2 mimeographed Adv. Sheets):

> "Section 401(d) *directs* the Board to issue a certificate authorizing the whole or any part of the transportation covered by an application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder, and that such transportation is required by the public convenience and necessity." (Emphasis supplied.)

other, as a matter of law. It is equally plain that the court below had the duty and power to compel the Civil Aeronautics Board to issue the one certificate or the other to State. The holding that *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, deprived the court of power to make such an order, is a decision which should be reviewed by this Court.

3. The foregoing questions are important not only to State, but are of general importance in connection with all appeals to the various United States Courts of Appeals from orders of administrative tribunals. As is evidenced by the decisions in *Securities Comm'n* v. *Chenery Corp.*, 332 U. S. 194, and *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, administrative agencies (at least prior to the effective date of the Administrative Procedure Act) have not always or, indeed, generally yielded gracefully to court decisions correcting their determinations. Indeed, the attitude of some of the agencies upon remand has been to reach the same result which had judicially been declared to be erroneous upon some different technical basis beyond the limited power of court review. Thus, the citizen who took the successful appeal obtained no benefits from his court victory. In the present case, where the court below held that the Board had erred in awarding the certificate of public convenience and necessity to Piedmont and plainly intimated that such certificate should have been issued to State, the Board may, nevertheless, endeavor[1] to devise a method for

[1]State does not concede that such endeavor would be lawful, and, perhaps, upon a second appeal, there would be another reversal. But, taking into account the shortness of human life and the limits upon plaintiff's resources resulting from the Board's very determination reversed in the court below, it is possible that the Board and Piedmont may ultimately succeed through State's sheer exhaustion. After all, State has been actively endeavoring to obtain the certificate of public convenience and necessity in question since 1941. The struggle cannot be carried on indefinitely.

avoiding the court decision entirely unless the Court of Appeals has the power to make the mandatory order envisaged by Section 10(e) of the Administrative Procedure Act. Without such order, State's economic doom may be sealed just as surely as if it had been the loser rather than the victor in the court below. As Pyrrhus said at Asculum, "One more such victory and we are lost." Congress in enacting the Administrative Procedure Act provided no such hollow remedy.

4. The review here sought is thus particularly appropriate for the decision below may leave State in the position of petitioner in *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327. Piedmont has the certificate to which State is entitled. As this Court pointed out in the *Ashbacker* case (p. 332):

> "Legal theory is one thing. But the practicalities are different. For we are told how difficult it is for a newcomer to make the comparative showing necessary to displace an established licensee."

5. As this is a cross-petition for writ of *certiorari*, the writ should be granted if the petitions of the Board and Piedmont are granted in order to bring before this Court the entire controversy which was adjudicated below.

Conclusion

WHEREFORE, your petitioner respectfully prays that writ of *certiorari* be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record in this case and that that portion of the judgment

of said United States Court of Appeals to which this cross-petition for writ of *certiorari* is directed may be reversed by this Court and that your petitioner have such other and further relief in the premises as to this Court may seem just; and your petitioner will forever pray.

Dated: July 5, 1949.

STATE AIRLINES, INC.,
Cross-Petitioner,

By FREDERICK W. P. LORENZEN,
Counsel for Cross-Petitioner.

PHILIP SCHLEIT,
Of Counsel.